

NTSB Order No. EA-4663

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 27th day of May, 1998

Docket SE-14696

6980

violated section 91.123(a) of the Federal Aviation Regulations by deviating from an air traffic control (ATC) clearance.² 14

C.F.R. § 91.123(a). After review of the briefs and record, we affirm the law judge's decision.³

In the October 17, 1996 suspension order, later filed as the complaint, the Administrator alleged:

1. You are now, and at all times mentioned herein were, the holder of Airline Transport Pilot Certificate No. 528883543.
2. On or about April 3, 1996, you acted as pilot in command of a Canadair 600 aircraft, N405SW, operating as Skywest Flight #922 on a flight from Salt Lake City, Utah, to Colorado Springs, Colorado.
3. During this flight, ATC cleared Flight #922 direct to FLOOD intersection, direct PUEBLO, direct COLORADO SPRINGS. Flight #922 acknowledged this clearance.
4. You deviated from this clearance by operating Flight #922 from the FLOOD intersection directly to COLORADO SPRINGS, placing the aircraft on a course which would have penetrated restricted Area R-2601, had ATC not intervened.

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²Section 91.123(a) states, in pertinent part:

§ 91.123 Compliance with ATC clearances and instructions.

(a) When an ATC clearance has been obtained, no pilot in command may deviate from that clearance unless an amended clearance is obtained, an emergency exists, or the deviation is in response to a traffic alert and collision avoidance system resolution advisory.... When a pilot is uncertain of an ATC clearance, that pilot shall immediately request clarification from ATC.

³We have not reviewed the portions of the decision that apply to the co-respondent, Norbert G. Schuchbauer, as he withdrew his appeal of the decisional order.

Respondent admits that he was the pilot in command of Skywest Flight 922 from Salt Lake City to Colorado Springs on April 3, 1996. Englestead Deposition (ED) at 5. Both he and the co-pilot wore headsets during the entire flight and, as the non-flying pilot, respondent was responsible for communications. Id. at 5-6. Flight 922's original clearance was from Salt Lake City via the 094 VOR radial of Salt Lake City, joining the Myton 303 radial, Jet Route J240, Blue Mesa Jet Route J28, Pueblo, direct Colorado Springs. Respondent's appeal brief at 6; declaration of Dennis Peck, Quality Assurance Specialist, Salt Lake City Air Route Traffic Control Center (ARTCC), at 2, ¶ 6. In flight, ATC gave respondent an amended clearance of "direct Flood, direct Pueblo, direct Colorado Springs," which respondent acknowledged as "direct Flood, roger."⁴ Respondent's appeal brief at 6; ED,

⁴The transcript of the recorded communication between ATC and Flight 922, covering the Salt Lake City ARTCC Sector 04 Radar position on April 3, 1996 (ED exhibit 1), reads as follows, in pertinent part:

2117:54	SKW922	skywest nine twenty two fourteen five for two three zero
2118:06	R04	skywest nine twenty two salt lake center roger climb and maintain flight level 330
2118:10	SKW922	three three zero nine twenty two
2125:45	R04	skywest nine twenty two could you navigate on your own direct flood intersection
2125:49	SKW922	affirmative
2125:51	R04	skywest nine twenty two roger cleared direct flood direct pueblo direct colorado springs
2125:55	SKW922	direct flood roger

exhibit 1.

Respondent insists that he heard only "direct Flood, direct Colorado Springs," but admits that he has no reason to believe that the statements attributed to ATC were not transmitted as they appear in the transcript. ED at 11. Further, he has only speculation to offer as an explanation of why he heard only the first and third part of the clearance.⁵ ED at 15-16. There was no squeal or other indication that the transmission had been "stepped on." ED at 20. Although he had never been sent direct Flood, direct Colorado Springs on this route before, and even though such a clearance would have required the aircraft to traverse restricted area R-2601, the clearance he believes he heard did not strike him as unusual at the time.⁶ ED at 17.

Soon after the aircraft turned toward Colorado Springs, Denver ATC instructed Flight 922 to turn 40 degrees right to avoid penetrating the restricted area. Transcript, Denver ARTCC, April 3, 1996 (ED, exhibit 2). The aircraft had been operated several miles north of Flood intersection.⁷ Declaration of John

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⁵Included in that speculation was the possibility that he did not hear the full clearance because his attention was diverted. ED at 16.

⁶Respondent acknowledged that information about restricted areas is customarily printed on IFR charts. ED at 9.

⁷Pueblo intersection was east of Flood. Complainant's Exhibit A-4.

According to John Tutor, Quality Assurance Specialist, Denver ARTCC, the aircraft penetrated the restricted area by about .18 miles and was about nine miles north of Flood

Tutor, Quality Assurance Specialist, Denver ARTCC (Complainant's Exhibit E).

The law judge found that respondent's statement that he did not hear "direct Pueblo," absent other evidence that would account for him not hearing the middle portion of the instruction while he heard the first and last part of the instruction, is insufficient to create an issue of fact over whether or not ATC's complete instruction was transmitted to Flight 922.

As for respondent's claim that ATC failure to require him to transmit a readback of the entire clearance contributed to the deviation, the law judge disagreed, finding that the readback was neither incorrect nor incomplete, in that it accurately restated the part of the original clearance that was amended.

Finally, the law judge found that sanction could not be waived under the Aviation Safety Reporting Program (ASRP) because respondent could not produce any physical evidence to show that he had filed the report within 10 days of the alleged violation.

On appeal, respondent, citing Administrator v. Rolund, NTSB Order No. EA-3991 (1993), aff'd 57 F.3d 1144 (D.C. Cir. 1995), and Order Denying Reconsideration, NTSB Order No. EA-4123 (1994),

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intersection. Complainant's Exhibit E. Respondent, however, maintains that the aircraft did not penetrate the restricted area and claims that the aircraft was operated only two or three miles north of Flood intersection before ATC intervened. ED at 20. In any event, this does not represent a material fact in dispute because respondent was charged with deviating from an ATC clearance, not entering restricted airspace. He does not dispute that he did not go "direct Pueblo" from Flood but instead started toward Colorado Springs.

argues that the law judge erred by determining that respondent's statement of simply not hearing the middle portion of the amended clearance was insufficient to excuse the failure to comply with an ATC clearance and asserts that he is being held to a strict liability standard.⁸

While a motion for summary judgment requires the law judge to view the facts in the light most favorable to the non-moving party, a bald assertion, such as respondent saying that he did not hear "direct Pueblo," absent any corroborative evidence, is not enough to rebut the Administrator's prima facie case. The ATC transmission contained a clearance of "direct Flood, direct Pueblo, direct Colorado Springs," with no evidence of a squeal or other sound which might indicate that there had been interference with all or part of the transmission. The law judge saw as most telling respondent's admission that he heard "direct Flood, direct Colorado Springs," and found respondent's statement that he did not hear, "direct Pueblo" insufficient to excuse a deviation from an ATC clearance. We have been presented with no reason to overturn the decision of the law judge.

Rolund may be distinguished from the instant case. There, ATC gave respondent wind and altimeter information, along with a 2500-foot altitude clearance and a runway assignment. He read

⁸As respondent notes, the Board has stated that "pilots can miss hearing instructions and ... they should not be held to a strict liability standard." Administrator v. Rolund, Order Denying Reconsideration, NTSB Order No. EA-4123 at 5 (1994), citing Administrator v. Frohmuth and Dworak, NTSB Order No. EA-3816 (1993).

back only the runway and his call sign, then proceeded to descend below 2500 feet. In his defense, the respondent argued that he had not heard the altitude instruction and that the clearance was not the usual one for the aircraft. We found that there was no evidence that the respondent's failure to hear the clearance was careless; there was no reason shown for the respondent to question that he would not have been given the usual altitude for that aircraft; and no evidence that the beginning of the transmission was heard. On reconsideration, we distinguished Rolund from Administrator v. Friesen and Ashcraft, 7 NTSB 515 (1990), where the respondents were assumed to have heard the middle of a transmission when they admitted to having heard the beginning and the end. Rolund recon., NTSB Order No. EA-4123 at 4, n.5. Friesen and Ashcraft, more than Rolund, is analogous to the instant case.⁹

Respondent also contends that ATC contributed to any deviation by not seeking a complete, correct readback of the entire clearance. He further avers that such action was required by the Controllers Handbook.¹⁰ The law judge found, and we agree, that the readback "accurately restated that part of the original clearance that was amended." Decisional Order at 6.

⁹The instant case also is distinguishable from Administrator v. Merrell, NTSB Order No. EA-4530 (1997), where the pilot's transmission indisputably was "stepped on" by a transmission from another aircraft.

¹⁰FAA Order 7110.56(J)(Change 3) of the Air Traffic Controllers Handbook directs a controller, after issuing a clearance, "[i]f altitude, heading, or other items are read back by the pilot, [to] ensure the readback is correct. If incorrect

Respondent chose to read back the only portion of the clearance that was amended -- "direct Flood." It was reasonable for the controller to conclude that respondent recognized the rest of the clearance -- "direct Pueblo, direct Colorado Springs" had not been amended. As such, this is not a case where ATC complicity can lead to a finding of no violation. See Administrator v. Jackson, NTSB Order No. EA-4381 at 6-7, n.10 (1995), aff'd 114 F.3d 283 (DC Cir. 1997), for a thorough discussion of caselaw on this issue. Furthermore, the clearance as respondent claims to have heard it would have taken the aircraft right through a restricted area around which, under the original clearance, the aircraft had been deliberately vectored. This perceived change should have alerted respondent, who as an ATP is held to the highest standard of safety, to a potential error or provided him with the impetus to request clarification from ATC.

Regarding the filing of a report under the ASRP, respondent claims his statement averring that he filed a timely report is sufficient to shift the burden of proof onto the Administrator to prove that respondent did not timely file a report. In this belief respondent is incorrect. To have sanction waived under the ASRP, a respondent must "prove[] that, within 10 days after the violation, he or she completed and delivered or mailed a written report of the incident or occurrence to NASA under ASRS." Complainant's Exhibit H, FAA Advisory Circular 00-46C, February 4, 1985. Respondent offered only his statement that he mailed

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or incomplete, make corrections as appropriate."

the form, but had no documentary evidence to support his statement.¹¹ The law judge correctly determined that respondent did not sustain his burden of proof on this issue.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and
2. The 30-day suspension of respondent's ATP certificate shall begin 30 days after service of this order.¹²

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.

¹¹Each report has a tear-off portion that, when NASA receives the report, is then stamped and returned to the airman as a receipt. Complainant's Exhibit H at 2.

¹²For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to FAR § 61.19(f).